

¹ ALJ Order (June 11, 2014).

Claimant asks the Board to reverse the ALJ's decision because no evidentiary hearing was held to give claimant an opportunity to state her job duties and responsibilities on the record. Claimant asserts that because no evidentiary hearing was held, Dr. Lowry Jones, Jr., an orthopedic physician, lacked information vital to his opinion. Dr. Jones opined claimant's bilateral shoulder condition was not work related. Claimant contends Dr. Daniel D. Zimmerman, an internal medicine physician, had the necessary information concerning claimant's job duties to opine claimant's work activities were the prevailing factor causing her shoulder injuries and need for medical treatment.

Respondent asks the Board to affirm the Order Denying Medical Treatment.

The issues on appeal are:

1. Did the ALJ fail to hold an evidentiary hearing prior to issuing the Order Denying Medical Treatment?
2. Did claimant sustain bilateral shoulder injuries by repetitive trauma arising out of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On September 13, 2013, claimant was evaluated by Dr. Zimmerman. The doctor took a history from claimant, reviewed her medical records and physically examined her. He indicated claimant complained of pain in both shoulders. Claimant attributed her pain and discomfort, which affected her left shoulder and to some extent her right shoulder, to working as a cashier 1½ years for respondent. Claimant indicated her shoulder symptoms occurred because she was required to move and lift merchandise and sack merchandise in plastic bags.

Dr. Zimmerman tested claimant's upper extremity deep tendon reflexes, measured her range of motion using a goniometer, tested her upper extremities using a Wartenberg wheel and measured her upper extremities. He also palpated and passively circumrotated her shoulders and tested her grip strength. The doctor indicated that a May 14, 2013, left shoulder MRI showed a full thickness tear at the anterior distal attachment of the supraspinatus tendon, marked to moderate glenohumeral osteoarthritis and mild acromioclavicular osteoarthritis.

Dr. Zimmerman opined claimant needed further diagnostic testing and should have a second opinion regarding operative intervention. The doctor opined:

The prevailing factor for the left shoulder rotator cuff tear is the repetitive trauma associated with her employment at Walmart from August 16, 2011 through August 9, 2013. The prevailing factor for an impingement syndrome affecting the right shoulder is the repetitive work duties performed by Ms. Castro in carrying out her job duties as a cashier at Walmart from August 16, 2011 through August 9, 2013.²

After seeing Dr. Zimmerman, claimant requested the claim be set for preliminary hearing. At the November 5, 2013, preliminary hearing, the parties agreed to have claimant independently evaluated by Dr. Jones. No terminal dates were set. The ALJ stated:

Okay, counsel, we had discussions off the record. The claimant is seeking additional medical treatment. The parties have agreed to an IME by Doctor Lowry Jones, and the doctor will be asked to address the prevailing factor and what, if any, additional treatment is necessary. And if the doctor finds that treatment is necessary and it's work-related, he'll be authorized to treat the claimant.³

The ALJ issued an Order Referring Claimant for Independent Medical Evaluation that, in part, instructed claimant's counsel to prepare a letter to Dr. Jones, including an itemization of "the relevant medical reports and records to be reviewed by Dr. Jones."⁴ The order also stated:

The doctor is directed to provide copies of the report of independent medical examination to the Court and all counsel of record after completion of the examination. Counsel for the respective parties may depose the examining physician after completion of the examination. If this order has been issued after the expiration of the respondent's terminal date, and the Court has reset or suspended terminal dates, Counsel wishing to depose the doctor shall notify the Court in writing within 10 days of the date of this order of the intent to take the doctor's deposition. If the intent to take a deposition is provided to the Court and counsel subsequently elects not to schedule the deposition, counsel shall notify the Court in writing that the deposition was not scheduled. Once a deposition is scheduled, counsel shall also provide a written notice of deposition to the Court.⁵

Dr. Jones evaluated claimant on May 15, 2014, and his IME report was dated the same day. Claimant presented with complaints of bilateral shoulder pain, left greater than right. Dr. Jones indicated claimant reported multiple joint pain, including shoulders and

² P.H. Trans., Cl. Ex. 1 at 5.

³ *Id.* at 4.

⁴ ALJ Order (Nov. 6, 2013) at 1.

⁵ *Id.* at 2.

knees in 2011, when she applied for Social Security disability. Claimant indicated she had arthritis in her joints. Claimant reported she worked for respondent two years and had to lift some heavy items from a conveyor belt occasionally.

According to Dr. Jones, a left shoulder MRI taken on May 14, 2013, revealed moderate to severe arthritis with a full thickness rotator cuff tear. Dr. Jones opined claimant's left rotator cuff tear was not based on any recent activity, but was the product of long-standing progressive rotator cuff tear arthropathy.

X-rays ordered by Dr. Jones revealed significant degenerative changes with large calcified inferior osteophytes and complete loss of glenohumeral joint space in the left shoulder. Right shoulder x-rays showed mild to moderate degenerative changes and the acromion had significant calcified inferior osteophytes. It was Dr. Jones' opinion the prevailing cause for the need for claimant's left shoulder treatment for her advanced arthritis was preexisting disease process. The doctor opined claimant's right shoulder pain and impingement was not due to her job activities, but primarily due to the severe limitation in her left shoulder, which was not work related. He believed claimant was a candidate for reverse total shoulder arthroplasty, but it was not related to her August 9, 2013, workers compensation claim.

Dr. Jones' IME report indicates it was sent to the ALJ and the parties' counsel. The IME report in the administrative file has a file stamp indicating the report was received by the Division on June 11, 2014. The ALJ issued the Order Denying Medical Treatment on June 11, 2014.

PRINCIPLES OF LAW AND ANALYSIS

Claimant alleges that prior to issuing the June 11, 2014, Order Denying Medical Treatment, the ALJ should have held an evidentiary hearing to allow claimant to present evidence concerning her work duties. In essence, claimant is alleging she was denied due process. Claimant, however, did not protest the fact the ALJ issued the order prior to giving claimant an opportunity to depose Dr. Jones.

This Board Member disagrees with claimant for several reasons. First, claimant did have an opportunity to provide information concerning her work duties. Claimant could have provided testimony or other evidence concerning her job duties at the November 5, 2013, preliminary hearing, but did not do so. Second, at the preliminary hearing, claimant made no request that an evidentiary hearing be held after Dr. Jones' report was received. Third, claimant could have provided information about her job duties to Dr. Jones during the IME appointment, which she apparently did. Fourth, claimant can request another preliminary hearing and provide evidence of her work duties.

This Board Member finds Dr. Jones' prevailing cause opinion more persuasive than Dr. Zimmerman's. Both physicians agreed claimant's May 2013 left shoulder MRI showed

a rotator cuff tear and osteoarthritis. Dr. Jones opined the tear was not based on any recent activity, but was the product of long-standing progressive rotator cuff tear arthropathy. Dr. Jones had the benefit of x-rays he ordered. Those x-rays revealed degenerative osteoarthritis, calcified osteophytes in both shoulders and a complete loss of glenohumeral joint space in the left shoulder.

Dr. Zimmerman stated claimant's work activities were the prevailing factor causing her left shoulder rotator cuff tear and right shoulder impingement syndrome. Dr. Zimmerman determined claimant had left marked to moderate glenohumeral osteoarthritis and mild acromioclavicular osteoarthritis. The doctor diagnosed claimant with right shoulder impingement syndrome, but not osteoarthritis. Dr. Zimmerman examined claimant's right shoulder, but did not have the benefit of any diagnostic test results for the right shoulder, nor did he order any diagnostic tests. Dr. Zimmerman's prevailing factor opinion fails to take into consideration claimant's preexisting bilateral shoulder osteoarthritis.

This Board Member finds claimant failed to prove her work activities were the prevailing factor causing her bilateral shoulder injuries and need for medical treatment. Therefore, claimant failed to prove she sustained injury by repetitive trauma arising out of her employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, the undersigned Board Member affirms the June 11, 2014, preliminary hearing Order Denying Medical Treatment entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of August, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

⁶ K.S.A. 2013 Supp. 44-534a.

⁷ K.S.A. 2013 Supp. 44-555c(j).

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Honorable Brad E. Avery, Administrative Law Judge